A **VIVAGANTH SANTHARASILAN v. PUBLIC BANK BHD**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-2133-11-2016]
4 JULY 2018

CIVIL PROCEDURE: *Striking out – Grounds for – Plaintiff successfully annulled receiving and adjudication order and sued bank for malicious prosecution – Whether* C *claim for civil malicious prosecution sustainable and actionable tort – Whether failure by bank to appeal against annulment order tantamount to admission – Whether court could conduct minute examination of documents – Whether plaintiff's action fell under O. 18 r. 19 of Rules of Court 2012 – Whether summary process of striking out pleadings suitable*

D The respondent ('defendant') issued a bankruptcy notice against the appellant ('plaintiff') premised on an indebtedness. The defendant subsequently obtained a receiving order and adjudication order ('ROAO') against the plaintiff. The ROAO was successfully annulled by the plaintiff and the defendant did not appeal against the annulment order. Thereafter, the E plaintiff filed an action against the defendant for damages for: (i) tort of civil malicious prosecution for maliciously bringing bankruptcy proceedings against the plaintiff; (ii) negligence; and (iii) abuse of process of court. However, the defendant successfully struck out the plaintiff's suit pursuant to O. 18 r. 19 of the Rules of Court 2012 ('ROC') on the grounds that the F plaintiff's action did not disclose any reasonable cause of action, was scandalous, frivolous or vexatious and was otherwise an abuse of the process of the court. Hence, appeal by the plaintiff on the grounds, *inter alia*: (i) the plaintiff's claim for civil malicious prosecution was sustainable and an actionable tort; (ii) the fact that the defendant did not appeal against the G annulment order tantamount to the defendant's admission that the bankruptcy proceedings against the plaintiff was an abuse of process and that the defendant did not have the right to commence the bankruptcy proceedings in the first place. Hence, it was not a plain and obvious case to be dismissed summarily.

H **Held (allowing appeal with costs in the cause)**
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The tort of malicious prosecution is a common law wrong. The individual who is aggrieved by legal proceedings improperly instituted against him may sue for damages for the tort of malicious prosecution. I Under the English law, the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings. It has, however, been extended to civil

claims which constitute special cases of legal process such as the malicious prosecution of a petition in bankruptcy or the malicious presentation of a winding-up petition. (paras 12 & 13)

(2) This was not a plain and obvious case for the court to exercise its power of striking out the statement of claim. The plaintiff's cause of action was predicated on the tort of maliciously instituting civil proceedings. It was pleaded that the defendant had maliciously instituted bankruptcy proceedings against the plaintiff. The statement of claim, as it stood, was not insufficient, even if proved, to entitle the plaintiff to his claim. (para 14)

(3) In a summary process under O. 18 r. 19 of the ROC, the court should not conduct a minute examination of the documents and facts in order to ascertain whether the plaintiff has a cause of action. The trial judge ought not to have conducted a minute examination of the documents and facts of the case in arriving at his finding. Hence, the appeal fell within the special cases of legal process such as the malicious prosecution of a petition in bankruptcy. As such, the summary process of striking out the pleadings was not suitable and the matter should proceed to full trial to be decided on *viva voce* and documentary evidence. (paras 15 & 16)

Bahasa Malaysia *Headnotes*

Responden ('defendan') mengeluarkan notis kebankrapan terhadap perayu ('plaintif') berasaskan keberhutangan. Defendan kemudian memperoleh perintah penerimaan dan perintah penghakiman ('ROAO') terhadap plaintif. Perintah penerimaan dan perintah penghakiman tersebut berjaya dibatalkan oleh plaintif dan defendan tidak merayu terhadap perintah pembatalan itu. Kemudian, plaintif memfailkan tindakan terhadap defendan untuk ganti rugi untuk: (i) tort pendakwaan niat jahat sivil kerana memulakan prosiding kebankrapan dengan niat jahat terhadap plaintif; (ii) kecuaian; dan (iii) penyalahgunaan proses mahkamah. Walau bagaimanapun, defendan berjaya membatalkan guaman plaintif menurut A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan-alasan tindakan plaintif tidak mendedahkan kausa tindakan munasabah, remeh, semberono atau menyusahkan dan sebaliknya penyalahgunaan proses mahkamah. Oleh itu, plaintif merayu atas alasan-alasan, antara lain: (i) tuntutan plaintif untuk pendakwaan niat jahat boleh dikekalkan dan boleh diambil tindakan dalam tort; (ii) fakta bahawa defendan tidak merayu terhadap perintah pembatalan menunjukkan defendan mengakui prosiding kebankrapan terhadap plaintif adalah satu penyalahgunaan proses dan defendan tiada hak, dari awal lagi, untuk memulakan prosiding kebankrapan. Oleh itu, ini bukan kes yang jelas untuk ditolak terus.

Diputuskan (membenarkan rayuan dengan kos dalam kausa)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Tort pendakwaan niat jahat adalah kesalahan common law. Individu yang terkilan dengan prosiding undang-undang yang dimulakan secara salah terhadapnya boleh menyaman untuk ganti rugi untuk tort pendakwaan berniat jahat. Bawah undang-undang Inggeris, tort pendakwaan niat jahat terhad pada permulaan pendakwaan jenayah dengan niat jahat dan tidak, secara amnya, wujud dalam prosiding sivil. Walau bagaimanapun, perkara ini dilanjutkan pada tuntutan sivil yang membentuk kes khas proses undang-undang seperti pendakwaan niat jahat untuk petisyen kebankrapan atau pengemukaan petisyen penggulungan dengan niat jahat.

(2) Ini bukan kes jelas untuk mahkamah melaksanakan kuasa pembatalan pernyataan tuntutan. Kausa tindakan plaintif berdasarkan atas tort memulakan prosiding sivil dengan niat jahat. Diplidkan bahawa defendan telah memulakan prosiding kebankrapan dengan niat jahat terhadap plaintif. Pernyataan tuntutan, seadanya, bukanlah tidak mencukupi, walaupun dibuktikan, untuk memberikan plaintif apa yang dituntut.

(3) Dalam proses terus bawah A. 18 k. 19 KKM, mahkamah tidak boleh menjalankan penilaian terperinci dokumen-dokumen dan fakta-fakta untuk menentukan sama ada plaintif mempunyai kausa tindakan. Hakim bicara tidak sepatutnya menjalankan penilaian terperinci dokumen-dokumen dan fakta-fakta kes dalam mencapai keputusannya. Oleh itu, rayuan ini terangkum dalam proses undang-undang kes khas seperti pendakwaan niat jahat petisyen kebankrapan. Oleh itu, proses terus pembatalan pliding tidak sesuai dan perkara tersebut tidak sepatutnya diteruskan ke perbicaraan penuh untuk diputuskan secara *viva voce* dan keterangan dokumentar.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Customs and Excise Commissioners v. Barclays Bank Plc [2006] 4 All ER 256 HL ***(refd)***

Gregory v. Portsmouth City Council [2000] 1 All ER 560 HL ***(refd)***

Jaafar Mohd Khalid v. Hong Leong Bank Bhd [2013] 8 CLJ 869 CA ***(refd)***

KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation) [2018] 8 CLJ 423 CA ***(refd)***

Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***

Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***

Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Tetuan Bee Ling & Co lwn. Vijendran Ponniah [2010] 6 CLJ 643 CA ***(refd)***

Willers v. Joyce & Anor [2016] UKSC 43 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Rules of Court 2012, O. 18 r. 19, O. 33 r. 2

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 14th edn vol 1, para 2-06

For the appellant - S Surendran; M/s Ranuga, Yogeswari & Surendran
For the respondent - Barry Goh Meng Yew; M/s Iza Ng Yeoh & Kit

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVC-127-03-2016 (overruled).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This is an appeal against the decision of the High Court in allowing the defendant's application to strike out the plaintiff's suit pursuant to O. 18 r. 19 of the Rules of Court 2012 on the grounds that the plaintiff's action does not disclose any reasonable cause of action, is scandalous, frivolous or vexatious, and is otherwise an abuse of the process of court. After hearing of submission, we allowed the appeal. We now set out our grounds of decision. In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[2] The following facts are not really in dispute.

(a) In 2007, the plaintiff together with one Selvaletchumi a/p Sivamoorthy ('Selvaletchumi') (jointly referred to as 'the borrowers') obtained a housing loan of RM96,600 from the defendant bank;

(b) Due to the default in the instalment payments, the defendant sued and obtained judgment in default of appearance for RM98,487.81 against the borrowers on 6 July 2009;

(c) On 21 February 2012, the property which was secured to the loan facility was foreclosed for RM73,900;

(d) On 10 September 2012, the plaintiff wrote to the defendant pleading with the defendant not to take any further action as he was in the process of looking for part-time work and that he will consider repayment once he gets work;

(e) The defendant replied to the plaintiff on 21 September 2012 stating that they will withhold legal action against the plaintiff "only at judgment stage subject to prompt repayment of RM500 per month with effect from

28 September 2012 ...". The defendant also stated that they "shall proceed with the bankruptcy action against another co-borrower Ms Selvaletchumi a/p Sivamoorthy immediately and to proceed with bankruptcy action against you if you failed to comply with the above condition (1)";

(f) Subsequently, there followed an exchange of letters between the plaintiff and the defendant;

(g) Meanwhile, on 8 October 2012, the defendant issued a bankruptcy notice against the plaintiff premised on an indebtedness of RM78,844.70;

(h) On 22 October 2012, the defendant wrote to the plaintiff stating *inter alia* that the defendant would proceed with bankruptcy action if they did not receive the September and October 2012 payment amounting to RM1,000 by 28 October 2012;

(i) Meanwhile, the plaintiff discovered that Selvaletchumi had been making payments to the defendant starting from 28 November 2013 to 26 December 2014 totalling RM9,000;

(j) Between 18 November 2013 and 24 September 2014, the defendant had been communicating separately with both the plaintiff and Selvaletchumi with different proposals for the repayment of the shortfall;

(k) On 2 June 2014, the defendant obtained a receiving order and an adjudication order (ROAO) against the plaintiff;

(l) The plaintiff applied to the High Court to annul the ROAO and on 2 June 2014 the ROAO was annulled by the Alor Setar High Court. The defendant did not appeal against the annulment order;

(m) On 3 March 2016, the plaintiff filed the present action against the defendant for damages for (i) the tort of civil malicious prosecution – for maliciously bringing bankruptcy proceedings against the plaintiff, (ii) negligence, and (iii) abuse of process of court.

Findings Of The High Court

[3] In essence, the key grounds of the learned judge are as follows:

(i) The plaintiff cannot sue for civil malicious prosecution because there must be a criminal prosecution first (*Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201 (FC); *Jaafar Mohd Khalid v. Hong Leong Bank Bhd* [2013] 8 CLJ 869; [2013] 5 MLJ 800 (CA); *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 (FC));

(ii) The plaintiff cannot sue for the tort of abuse of process because there is no *mala fide* on the part of the defendant (*Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693 (FC)); and

(iii) The plaintiff cannot sue for the tort of negligence because parties to a proceeding and their solicitors and counsel do not generally owe any duty of care to the other side (*Customs and Excise Commissioners v. Barclays Bank Plc* [2006] 4 All ER 256 HL; *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507).

Submission Of Parties

[4] On the first point concerning civil malicious prosecution, learned counsel for the plaintiff argued that the learned judge's reliance on *Rawther (supra)* is misplaced as the facts in that case are materially different. That case, the plaintiff had successfully sued for malicious prosecution after the plaintiff was acquitted of a charge of making a false affidavit. The Federal Court reversed the decision of the lower court on the ground that the plaintiff had failed to prove that it was the defendant who set the criminal law in motion against the plaintiff. Similarly, *Jaafar (supra)* is also distinguishable on the facts. Learned counsel relied on *Tetuan Bee Ling & Co lwn. Vijendran Ponniah* [2010] 6 CLJ 643 (CA) to argue that the plaintiff's claim for civil malicious prosecution is sustainable and an actionable tort. The learned judge also failed to consider the plaintiff's averments in his affidavit and statement of claim of the acts of malice by the defendant. *Tetuan Bee Ling & Co (supra)* supports the proposition that civil malicious prosecution is a recognised cause of action. Malicious prosecution is an actionable tort and includes the prosecution of civil proceedings (*Willers v. Joyce & Anor* [2016] UKSC 43).

[5] On the second and third point concerning abuse of court process and negligence, learned counsel for the plaintiff argued that the learned judge did not provide any reasons for arriving at his finding that there was no *mala fide*. The fact that the defendant did not appeal against the annulment order is tantamount to the defendant's admission that the bankruptcy proceedings against the plaintiff was an abuse of process and that the defendant did not have the right to commence the bankruptcy proceedings in the first place. Therefore, learned counsel argued that this is not a plain and obvious case to be dismissed summarily and the plaintiff should be given an opportunity to prove at trial that the defendant did not have a reasonable and probable cause to the ROAO against the plaintiff (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 (SC)).

[6] In reply, learned counsel for the defendant argued that there is no such tort as 'civil malicious prosecution'. Since the plaintiff pleaded the tort of malicious prosecution and not the tort of civil malicious prosecution, *Rawther*'s case applies and the plaintiff is required to satisfy the five elements *viz*, (i) the defendant has set a criminal law in motion against the plaintiff; (ii) the criminal proceedings against the plaintiff terminated in the plaintiff's

favour; (iii) the defendant had no reasonable and probable cause for setting the law in motion against the plaintiff; (iv) the criminal proceedings was actuated with malice in that the defendant had a motive other than to only carry the law into effect; and (v) the plaintiff must prove damages. The facts in *Jaafar*'s case are the same with the instant case. There was no criminal charge set in motion against the plaintiff.

[7] Learned counsel for the defendant also argued that the plaintiff's reliance on *Tetuan Bee Ling*'s case is misconceived as the Court of Appeal in *Jaafar*'s case had pronounced that the causes of action preferred by the plaintiff in *Tetuan Bee Ling*'s case did not include the tort of malicious prosecution but the tort of malicious civil proceedings or malicious proceedings in bankruptcy. Further, since the bankruptcy proceedings commenced against the plaintiff in this case was based on a valid judgment and this fact is admitted by both parties, this itself makes it conclusive that the defendant had a reasonable and probable cause to lodge bankruptcy proceedings.

[8] Learned counsel also argued that *Willers v. Joyce (supra)* does not apply as it conflicts with the Federal Court decision in *Rawther*'s case (s. 3 of the Civil Law Act 1956).

Striking Out Process Under O. 18 r. 19 Of The ROC 2012

[9] Under O. 18 r. 19 of the ROC 2012, the court has the power to strike out the whole or part of any pleading which discloses no reasonable cause of action, or which is scandalous, frivolous or vexatious, or which may prejudice, embarrass or delay the fair trial of the action, or which is otherwise an abuse of the process of the court. The process of striking out pleadings under this rule is summary in nature.

[10] The following principles upon which the court acts in exercising its summary powers of striking out pleadings are well settled and established in the oft-cited decision of the then Supreme Court in *Bandar Builder Sdn Bhd (supra)*:

(i) The court's power of striking out pleadings is exercisable only in plain and obvious cases and where no reasonable amendment would cure the defect;

(ii) The court in exercising its powers should not conduct a minute examination of the documents and facts of the case in order to ascertain whether the party has a cause of action;

(iii) If the point requires substantial argument and careful consideration, it may be more appropriate to set it down for trial under O. 33 r. 2 of the ROC 2012;

(iv) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious in the sense that it is plainly evident that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks; and

(v) So long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

Decision

[11] The defendant's principal argument is that the tort of civil malicious prosecution is non-existent; learned counsel cited numerous authorities in support of his proposition. If the defendant's contention is correct, then this is a plain and obvious case that the pleadings disclose no reasonable cause of action, then the statement of claim must be struck out. Is the defendant's argument borne out? In order to answer this question, it is necessary to set out below a brief treatise on the tort of malicious prosecution in the context of this appeal.

Tort Of Malicious Prosecution

[12] The tort of malicious prosecution is a common law wrong. It strikes at the balance between two countervailing interests of social importance: safeguarding the individual from being harassed by unjustified litigation and encouraging citizens to aid in law enforcement. On the one hand, it is the right of every person to put the law in motion if he does it with the honest intention of protecting his own or the public interest. Conversely, if legal proceedings are initiated against an individual for a collateral purpose or without any proper basis or foundation for believing that they will ultimately succeed, that individual may suffer great injury during the course of the proceedings. That individual who is aggrieved by legal proceedings improperly instituted against him may sue for damages for the tort of malicious prosecution.

[13] Under English law, the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings. It has, however, been extended to civil claims which constitute special cases of legal process such as the malicious prosecution of a petition in bankruptcy or the malicious presentation of a winding-up petition (as observed by Lord Steyn in *Gregory v. Portsmouth City Council* [2000] 1 All ER 560 HL; see also *KHK Advertising Sdn Bhd v. Siera Management Sdn Bhd (In Liquidation)* [2018] 8 CLJ 423; [2018] 3 AMR 285 (CA) at para. [52]). Indeed, it has also been opined in *Bullen & Leake & Jacob's Precedents of Pleadings*, 14th edn vol. 1 at para. 2-06 that an action may lie for

A the abuse of ordinary civil process in respect of a tort of maliciously instituting civil proceedings. In most respects, the matters which must be proved and pleaded are fundamentally the same except that the proceedings do not need to have been determined in the claimant's favour.

[14] Applying the established principles, we are of the considered view that
B this is not a plain and obvious case for the court to exercise its power of striking out the statement of claim. In this case, the plaintiff's cause of action is predicated on the tort of maliciously instituting civil proceedings. In particular, it is pleaded in para. 23 of the statement of claim that the defendant had maliciously instituted bankruptcy proceedings against the
C plaintiff. The circumstances leading to the making of an ROAO against the plaintiff and the annulment of the ROAO are contained in paras. 3 to 22 of the statement of claim. We do not think that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to his claim. Whilst the cause of action may not have been appropriately framed in the
D statement of claim, we are not satisfied that no reasonable amendment would cure the defect.

[15] In his written judgment, the learned judge opined that the plaintiff cannot sue for the tort of abuse of process as there is no evidence to prove *mala fide* on the part of the defendant in taking out the bankruptcy
E proceedings against the plaintiff. With respect, we do not think that the learned judge ought to have conducted a minute examination of the documents and facts of the case in arriving at his finding. The established principles are quite clear that in a summary process under O. 18 r. 19, the court should not conduct a minute examination of the documents and facts
F in order to ascertain whether the plaintiff has a cause of action.

[16] At any rate, we are in agreement with the views expressed in preceding para. [12] and the undisputed facts of the instant appeal fall within the special cases of legal process such as the malicious prosecution of a petition in bankruptcy. As such, we are of the considered view that on the facts, the
G summary process of striking out the pleadings is not suitable and the matter should proceed to full trial to be decided on *viva voce* and documentary evidence.

[17] In consequence thereof, we allowed the appeal with costs in the cause and remitted the matter to the High Court for full trial.

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